IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 26, 2006

STATE OF TENNESSEE v. MILTON MORENO

Direct Appeal from the Criminal Court for Hawkins County
No. CR360 James E. Beckner, Judge

No. E2005-02567-CCA-R3-CD - Filed December 6, 2006

The defendant, Milton Moreno, pled guilty to possession of over .5 grams of cocaine with intent to deliver, a Class B felony, and was sentenced as a Range I, standard offender to eight years in the Department of Correction. As a condition of his guilty plea, he reserved a certified question of law pursuant to Rule 37(b)(2)(A) of the Tennessee Rules of Criminal Procedure: whether the stop of the defendant's vehicle and the seizure of his person, resulting from a police officer's monitoring a telephone conversation, was lawful. Following our review, we conclude that the certified question is not dispositive of the defendant's case and dismiss the appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

ALAN E. GLENN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. MCLIN, JJ., joined.

Paul Whetstone, Morristown, Tennessee, for the appellant, Milton Moreno.

Paul G. Summers, Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; C. Berkeley Bell, District Attorney General; and Douglas Godbee, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

Following the defendant's indictment for possession of over .5 grams of cocaine with intent to deliver, he filed a motion to suppress, arguing that the stop, seizure of his person, detention, and search of his car violated his constitutional rights.

At the October 7, 2005, suppression hearing, Detective Brad Depew of the Hawkins County Sheriff's Department Narcotics Unit testified about the events that led him and other officers to stop the defendant in his vehicle and seize a bag of cocaine. Depew said that on January 30, 2004, he

executed a search warrant at the Rogersville residence of Kenneth Montgomery and found a felony amount of cocaine. Because he was going to be arrested and hoped "that it might help him eventually," Montgomery initiated a conversation and offered to call "a Mexican national named Milton and have a quantity of cocaine delivered to the residence." Depew said that Montgomery told him, "I want you to listen," before making the call. Depew did not have a recording device but stood beside Montgomery while he made the call and could hear him and the person on "the other end." Relating the conversation, Depew testified:

> Mr. Montgomery stated to the subject on the phone that he wanted two "eight balls" delivered. The subject on the other end asked if he wanted hard or soft. Mr. Montgomery stated he wanted soft. The subject stated it would be around roughly thirty minutes before he could deliver it to the residence.

According to Depew, "Montgomery stated that Milton, when he delivered, would be driving a black Sun[fire]," and described him as "short and black headed."

Depew said he then "strategically" placed officers along Bert Price Road, which was the dead-end road on which Montgomery's residence was located. He testified that approximately thirty minutes later, a black Sunfire came down the road and the headlights of the officers' car at the stop sign "were shining directly into the windshield." The officers observed two men who appeared to be Hispanic in the car. Depew instructed another officer to stop the vehicle "seventy-five to a hundred yards" from Montgomery's residence. When Depew approached the car, he saw a "plastic baggy sticking up" between the arm rest and the driver's seat. Depew said that the driver of the car was the defendant and that the plastic bag contained a white powdery substance, later determined to be 10.2 grams of cocaine. At the close of the hearing, the trial court denied the defendant's motion to suppress.

ANALYSIS

The defendant's motion to suppress argued briefly and in general terms "that the stop, seizure of his person, detention, and resulting search of the car violated" various of his constitutional rights.

Following the hearing, the trial court concluded that the motion to suppress was without merit. First, the court found that it was not unlawful for Detective Depew to monitor the conversation between Montgomery and the defendant:

> Under Tennessee law, as long as the caller, Mr. Montgomery, invited the detective to listen in on the conversation and make the call and under the facts and circumstances, it would not be a violation of Tennessee law or federal law, wiretap law. It was a legal procedure sanctioned by the courts.

The court made extensive findings as to the facts of the case, including information Montgomery gave to Detective Depew, Montgomery's incentive to provide the information and

arrange for the drug buy, and the officers' verification of the information by waiting for the defendant's vehicle:

> As I understand it, the detectives had probable cause to go get a search warrant to search Mr. Montgomery's home. They did so and found drugs there, cocaine. And Mr. Montgomery then, as in many instances defendants do, was trying to mitigate his possible charges against him, and he wanted to rat somebody else out, to put it in plain language. So sometimes when you do that, the State's willing to give you some slack; but in this case, there was no indication that necessarily that it would but, certainly, the officer didn't turn the offer down. The officer pursued it. Mr. Montgomery told Detective Depew that he could call, and he identified the person he was calling as a Mexican national, and have cocaine delivered to his residence, and so he made the call and Detective Depew listened on the phone. He heard both sides of the conversation, and Mr. Montgomery told him the person that he was calling that his first name was Milton; and when he called that person and said, Milton, that person said, Yes. Then the conversation was about how much do you want and how do you want it, hard or soft. The person who said he was Milton on the other end said it would take about thirty minutes, and the vehicle was described that would make the delivery within about thirty minutes. Sure enough, a vehicle of that very description showed up in about thirty minutes and it contained persons that appeared to match the description of Mexican nationals or Hispanics, and the officers had decided they were going to stop the vehicle when they got there.

Based on these facts, the court concluded that the officers' stop of the defendant's vehicle was lawful and that the baggie with cocaine was in plain view of the officers:

> Now, that vehicle could have been stopped for a reasonable suspicion of criminal activity, a Terry versus Ohio stop. But the corroboration of everything that Mr. Montgomery had said to this point was so great that the officers were armed with more than probable cause. They were actually – I mean, more than reasonable suspicion of criminal activity. They were actually armed with probable cause to stop the vehicle to believe that there was cocaine in that vehicle. And that probable cause, given the exigent circumstances, which obviously existed, and [defense counsel] acknowledged that, being in a moveable car, operable car, at the time, the exigent circumstances gave them the right to search the vehicle. Of course, added to that, even if it had been a reasonable suspicion of criminal activity stop rather than a probable cause stop, the plain view doctrine came into effect. It's uncontradicted that when they came to the car and were in a place that they had a right to be, just to look into the car and make inquiry, they saw . . . a baggy that from their experience appeared to contain cocaine. That could have led to a search of the vehicle in itself.

Subsequently, the defendant pled guilty and phrased the certified question as follows:

> Whether the stop and seizure of the [d]efendant, while driving his vehicle, and thus the consequent search of the contents of the vehicle incident to the stop, was based on sufficient articulable facts to justify the initial stop and seizure of the [d]efendant's person, pursuant to Art. I § 7, Constitution of Tennessee. Those "facts" being Detective Brad Depew's monitoring of a telephone conversation without a [c]ourt [o]rder, between a cooperating witness, whose veracity was never independently ascertained, and an individual who was alleged to be the [d]efendant, who did not authorize the interception of the communication.

The certified question focuses solely on the portion of the trial court's ruling that it was lawful for Detective Depew, with the permission of Montgomery, to listen in on the conversation between Montgomery and the defendant. By the wording of his question, the defendant seeks to limit this court to considering solely the portion of the court's ruling as to the monitoring of the telephone call in assessing the legality of the stop of the defendant's vehicle and Detective Depew's then seeing in plain view the baggie of cocaine.

Rule 37(b) of the Tennessee Rules of Criminal Procedure permits a defendant both to plead guilty and appeal a certified question of law if the defendant has entered into a plea agreement under Rule 11(e) and has "explicitly reserved with the consent of the state and of the [trial] court the right to appeal a certified question of law that is dispositive of the case." Tenn. R. Crim. P. 37(b)(2)(A); see also State v. Armstrong, 126 S.W.3d 908, 910 (Tenn. 2003). Additionally, Tennessee Rule of Criminal Procedure 37(b)(2)(A) requires that:

> (i) the judgment of conviction, or other document to which such judgment refers that is filed before the notice of appeal, must contain a statement of the certified question of law reserved by defendant for appellate review;
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> (ii) the question of law must be stated in the judgment or document so as to identify clearly the scope and limits of the legal issue reserved;
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> (iii) the judgment or document must reflect that the certified question was expressly reserved with the consent of the state and the trial judge; and
>
> (iv) the judgment or document must reflect that the defendant, the state, and the trial judge are of the opinion that the certified question is dispositive of the case[.]

In State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988), our supreme court explained the procedures which must be followed before a question of law could be properly certified pursuant to Tennessee Rule of Criminal Procedure 37(b)(2)(i) or (iv). The court noted that most of the cases seeking appellate review of a certified question had been dismissed because the question certified was not dispositive, as required. Although the parties and the trial court have agreed that the certified question is dispositive, "[t]his Court is not bound by the determination and agreement of the trial court, a defendant and the State that a certified question is dispositive of the case." State

v. Thompson, 131 S.W.3d 923, 925 (Tenn. Crim. App. 2003). Instead, the appellate court is "required to make an independent determination of the dispositive nature of the question reserved, and appellate review must be denied if the record does not clearly demonstrate how the question is dispositive." State v. Oliver, 30 S.W.3d 363, 364 (Tenn. Crim. App. 2000). As we will explain, we conclude that the certified question is not dispositive and, therefore, this appeal must be dismissed.

The transcript of the hearing on the motion to suppress shows, as does the ruling of the trial court, that officers had much information, in addition to that obtained from the telephone conversation questioned by the defendant, which resulted in the stop of the defendant's vehicle and the seizure of cocaine from it. In brief, officers executed a search warrant at the residence of Kenneth Montgomery, seized a quantity of cocaine sufficient to constitute a felony, and arrested Montgomery. He then offered to telephone "a Mexican national named Milton" to have a quantity of cocaine delivered and allowed Detective Depew to listen in on the conversation. Afterwards, Montgomery described "Milton" and the car he would be driving. Then, Depew directed officers to wait at strategic spots on the dead-end street where Montgomery's residence was located. Passing along the information he had received from Montgomery, Detective Depew told the officers that "Milton" was short and black-headed and would be driving a black Sunfire automobile. Officers stopped such an automobile on Montgomery's street and saw that it was occupied by two male Hispanics. Detective Depew approached the automobile, which was operated by the defendant, and saw in plain view through the window a plastic baggie containing a white powdery substance which later was determined to be cocaine. All of this was exclusive of what Detective Depew heard while listening in on the conversation between Montgomery and the defendant. Thus, it is apparent that analysis of whether the police had reasonable suspicion to stop the defendant's car must include many facts and circumstances in addition to the information Depew obtained from listening to Montgomery's telephone conversation. The officers' ability to act upon these additional facts would not be affected by a ruling adverse to the State on the certified question.

Accordingly, we conclude that even if the defendant were correct[1] in his claim that Detective Depew could not listen in on the telephone conversation or act upon information gained from it, we would not dismiss the defendant's charge but would remand the matter for further proceedings. See State v. Wilkes, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984) ("A question is never dispositive when we might reverse and remand[.]"). The certified question is not dispositive of the charge against the defendant, and we dismiss his appeal.

[1]We note that the defendant cites no authorities for his claim that Detective Depew's monitoring of the telephone call was illegal and that the authorities, in fact, are to the contrary. See Manetta v. Macomb County Enforcement Team, 141 F.3d 270, 276 (6th Cir. 1998) (stating "neither the United States Constitution nor any federal statute prohibits law enforcement officials from recording or listening to phone conversations so long as one of the parties to the conversation has consented").

CONCLUSION

Based on the foregoing reasoning and authorities, we dismiss the appeal.

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ALAN E. GLENN, JUDGE